



2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

December 15, 2014

TO: Brian Patterson, President
Kitcki Carroll, Executive Director
United South and Eastern Tribes, Inc.

FROM: Hobbs, Straus, Dean and Walker, LLP

Re: Court Upholds Interior Decision to take land into trust for Cowlitz Tribe

On December 12, 2014, the United States District Court for the District of Columbia dismissed the lawsuit brought by the Confederated Tribe of the Grande Ronde Community of Oregon and Clark County, WA challenging the Department of Interior's decision to take 152 acres of land into trust for gaming purposes for the Cowlitz Tribe. The decision is a significant victory for tribes seeking to minimize the impact of the Supreme Court's *Carcieri* decision. The Court rejected all of the plaintiffs' *Carcieri*-based challenges, deferring to the Department of Interior's determination that the Cowlitz Tribe qualified to take land into trust.

As you know, USET submitted an amicus curiae brief in support of the Cowlitz Tribe on the *Carcieri* issues in the case. Since the decision came out on Friday, attorneys for the Cowlitz Tribe and for the United States have made it a point to express their appreciation to USET for its brief noting they believed it was very helpful in winning the case. Following is a brief summary of the decision, which is attached.

I. The Court Rejects Plaintiffs' *Carcieri*-based arguments

The Indian Reorganization Act authorizes the Secretary of Interior to acquire land in trust for "Indians," which is defined in Section 19 of the IRA to include, "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that "now under federal jurisdiction" meant that a tribe had to be under federal jurisdiction in 1934, the year the IRA was enacted.

The plaintiffs argued that the Secretary's decision to take land into trust for the Cowlitz Tribe was unlawful because (1) the IRA requires a tribe to demonstrate it was both "recognized," and "under federal jurisdiction" in 1934, and (2) that the Cowlitz

Tribe was neither “recognized” nor “under federal jurisdiction” in 1934. The Court rejected both arguments.

1. Cowlitz did not have to show it was a Recognized Tribe in 1934

The USET-Jamestown Amicus brief focused on this issue, seeking to overcome plaintiffs’ arguments that, after *Carcieri*, tribes must demonstrate they were both “recognized” and “under federal jurisdiction” in 1934. The brief argued that neither the plain language of the statute, its legislative history, nor the *Carcieri* decision requires tribes seeking to take land into trust today to demonstrate that they were “recognized” in 1934. This is a critically-important point, as many tribes were not recognized in the modern, formal sense of the term until after 1934.

The Court held that the *Carcieri* decision did not hold that a tribe must also demonstrate it was “recognized” in 1934 in order to have land taken into trust. The Court noted that the *Carcieri* decision was focused entirely on the term “under federal jurisdiction,” and did not address “recognition” at all. The Court noted that “[b]y ignoring the concept of recognition altogether, the *Carcieri* opinion in no way supports Plaintiffs’ position that the term recognized should be read in conjunction with the phrase ‘now under federal jurisdiction.’” The Court went on to note that the only discussion of “recognition” came in the concurring opinions by Justices Breyer, Souter and Ginsberg, which took the view that Section 19 of the IRA places no time limit on the term “recognition.” The Court concluded that as a result the *Carcieri* decision was at the very least ambiguous on whether a Tribe must show it was recognized in 1934 to meet the definition of “Indian” in the IRA.

The Court also noted that the plain text of the Statute and its legislative history are ambiguous as to whether a tribe must demonstrate it was recognized in 1934. It also rejected plaintiffs’ arguments that the statutory context demonstrates that tribes must show they were recognized in 1934. The Court concluded that “the Court finds that the term “recognized” does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term.” Because it found the term to be ambiguous, the Court deferred to the Secretary’s interpretation under well-settled principles of Administrative Law. As the Court concluded, “given the above discussion and Justice Breyer’s concurrence in *Carcieri*, this Court finds the Secretary’s interpretation of the term “recognized” to be reasonable and defers to it.”

2. The Cowlitz Tribe was Under Federal Jurisdiction in 1934

The Court also rejected plaintiffs’ arguments that the Cowlitz Tribe was not “under federal jurisdiction” in 1934. The Secretary adopted a two part test to determine whether the Cowlitz tribe was under federal jurisdiction in 1934. Plaintiffs challenged that test as inconsistent with the plain language of the IRA and its legislative history. The Court found the IRA and its legislative history to be ambiguous, and deferred to the test developed by the Secretary.

The Secretary's two-part test¹ asks:

- (1) whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or a series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members – that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government; and
- (2) whether the tribe's jurisdictional status remained intact in 1934.

The Court concluded the Secretary's two-part test was not unreasonable, and therefore was entitled to deference. The Court rejected plaintiffs' arguments that the Secretary erred when it used evidence of dealings between the United States and individual members of the Cowlitz tribe as evidence that the Tribe itself was under federal jurisdiction in 1934. The Court held that it was reasonable for the Secretary to consider dealings with individual members as evidence that the United States had a relationship with the Tribe as a whole.

The Court similarly rejected plaintiffs' arguments that the legislative history of the IRA demonstrated that the use of the phrase "under federal jurisdiction" was intended to narrow the class of Indians who qualified for the IRA beyond the Secretary's two part test. While the Court recognized that the term "under federal jurisdiction" was intended to narrow the definition of Indian in the IRA, it concluded that the legislative history was unclear as to whom or what was intended to be excluded from the definition. As a result, the Court found it to be ambiguous, and deferred to the Secretary's test as a result.

3. The Application of the Two Part Test Was Not Unreasonable

The Court then examined the record relied upon by the Secretary in determining that the Cowlitz Tribe met the two-part test, and concluded that the Secretary's determination that the Cowlitz Tribe was "under federal jurisdiction" was not unreasonable. As a result, it upheld the decision.

The Cowlitz Tribe was able to provide an enormous amount of documentation to support a finding that it was "under federal jurisdiction" in 1934. Among the factors cited by the Court include:

- Failed Treaty Negotiations in 1855

¹ The USET-Jamestown Amicus brief did not specifically advocate for the use of this test, but instead argued that the Secretary should have broad discretion to determine whether a tribe came under the federal jurisdiction of the United States on a case-by-case basis and in a manner consistent with the unique history of each tribe.

- Support from Interior for the Tribe in bringing its claims beginning in 1904 that its lands were never properly ceded to the United States
- A course of dealings between the United States and the Cowlitz Tribe from the 1850s to 1934, including providing tribal members with goods and provisions and education and medical care
- Interactions between the Tribe and the Taholah Agency
- Issuing public domain allotments for members of the Tribe, and
- Approval by the Secretary of an attorney contract with the Tribe in 1932

The Court noted that while failed treaty negotiations in and of themselves would be insufficient to demonstrate that the Tribe came under federal jurisdiction, the course of dealings demonstrated by the Cowlitz Tribe were sufficient.

The Court also rejected plaintiffs' argument that the National Indian Gaming Commission determination that the Tribe had been terminated was dispositive on the question as to whether the Tribe was under federal jurisdiction in 1934. According to the Court, the Tribe was administratively terminated. While an administrative termination may have terminated the government-to-government relationship with the United States, that did not, according to the Court, mean that the Tribe was no longer "under federal jurisdiction." Because only Congress' plenary authority over tribes may only be divested by Congress itself, the Court concluded, the actions of administrative agencies cannot render a tribe no longer under federal jurisdiction. This finding is significant, and consistent with the arguments made in the USET-Jamestown amicus brief.

Finally, the Court rejected arguments made by plaintiffs that contrary evidence demonstrating the Tribe was no longer under federal jurisdiction was dispositive. The Court noted that the Secretary reasonably balanced that evidence against all the other evidence to determine that the Tribe remained under federal jurisdiction in 1934.

II. The Court Upholds Secretary's Gaming Determination Under the Initial Reservation Exception

The Indian Gaming Regulatory Act ("IGRA") permits a tribe to game on land acquired into trust after IGRA's 1988 enactment date if it qualifies for the initial reservation exception. 25 U.S.C. § 2917(b)(1)(B)(ii). To qualify as a tribe's initial reservation, land must be "within an area where the tribe has significant historical connections," 25 C.F.R. § 292.6, demonstrated through "historical documentation [of] the existence of the tribe's villages, burial grounds, occupancy[,] or subsistence use in the vicinity of the land." *Id.* § 292.2.

The plaintiffs argued that the Department violated the Administrative Procedure Act (APA) in finding that the Tribe had significant historical connections to the land, as it was located 14 miles outside the area the Indian Claims Commission had defined as the Tribe's aboriginal territory. According to the plaintiffs, IGRA and its implementing

regulations require long term use and occupancy of the land itself or land directly surrounding it. They further argued that the Department's past gaming eligibility decisions examining the significant historical connection requirement conflicted with the Department's decision for the Tribe's Parcel.

The United States argued that a tribe need only demonstrate historic use and occupancy rather than past ownership of land. The United States also argued that use and occupancy only need to take place within the vicinity of the land, and the land need not be located in the center of a tribe's historic territory. The United States argued that the Indian Claims Commission used stricter standards for establishing aboriginal title than the standard required to demonstrate a significant historical connection.

The Court agreed with the United States that IGRA's implementing regulations do not unambiguously require a finding of long term use or occupancy or that the tribe claimed any ownership or control over the land. Further, the Court held that the regulations do not require use or occupancy on the land itself or on land directly surrounding or adjacent to it. Instead, the Court noted that the regulations require "the Parcel be located within an area where the tribe has significant connections, which, in turn, can be demonstrated through tribal use or occupancy of land in the vicinity of the Parcel." Therefore, the Court deferred to the Department's interpretation of IGRA and its implementing regulations and their applicability to the Tribe's Parcel.

The Court also held that the Department's gaming eligibility decision for the Tribe was consistent with its past gaming eligibility decisions examining the significant historical connection requirement. First, the Department applied the definition of vicinity it had previously expanded on in its gaming eligibility decision for the Scotts Valley Band of Pomo Indians, concluding that evidence of use and occupancy surrounding the Tribe's land supported the natural inference that the Tribe used or occupied the land as well.

The Court concluded that the Department did not violate the APA in its interpretation of significant historical connection in concluding that the Tribe's Parcel qualified for the initial reservation exception.

III. The Court Rejected Plaintiffs' NEPA Challenges

The plaintiffs argued that the Department did not comply with the National Environmental Policy Act ("NEPA") in its decision to acquire the land into trust for the Tribe. As an initial matter, the Court held that Grand Ronde lacked standing to bring suit for NEPA violations because it had not demonstrated its interest in the land or how the trust acquisition would injure that interest.

The Court went on to examine the Clark County plaintiffs' NEPA challenges, finding each invalid. First, the Court found that the Department had properly relied on a tribal ordinance incorporated into an NIGC-approved gaming ordinance for provision of

mitigation measures. Second, the Court found the Department permissibly relied on the Tribe's own report for its economic objectives and needs when the Department assessed the feasibility of alternatives. Third, the Court found the Department had sufficiently addressed water issues because NEPA did not require the Department to consider the possibility that the Tribe may not receive a National Pollution Discharge Elimination System permit. Last, the Court held that the Department was not required to issue a supplemental environmental impact statement despite the County's revised storm water management standards because State law would not apply to the trust land. The Court concluded that the Department did not violate NEPA in its decision to acquire the Parcel into trust for the Tribe.

IV. Conclusion

The Court's decision is a significant victory for the Cowlitz Tribe, and for tribes seeking to mitigate the damage done by the Supreme Court in the *Carciari* decision. Given the resources that Grand Ronde and Clark County have already spent in the case, however, there is a strong likelihood that one or both parties may choose to appeal the decision to the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit). If such an appeal is made, USET should consider whether it would like to update and file the amicus brief it presented in the case below to the D.C. Circuit.

Please let us know if you would like to discuss any aspect of this decision.